

No. 14908

In the
United States Court of Appeals
For the Ninth Circuit

PANCHO BARNES, Also Known as FLORENCE LOWE BARNES,	}	<i>Appellant,</i>
vs.		
UNITED STATES OF AMERICA,		
		<i>Appellee.</i>

Appellant's Opening Brief

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PANCHO BARNES, Also Known as FLORENCE LOWE BARNES, <div style="text-align: right;"><i>Appellant,</i></div> <div style="text-align: center;">vs.</div> UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div>	}	No. 14908
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Appellant's Opening Brief

To the Honorable, the Court of Appeals of the United States for the Ninth Circuit:

This is an appeal from a judgment of the Honorable Leon R. Yankwich, Chief Judge of the United States District Court for the Southern District of California, Central Division, entered on April 12, 1955, in favor of Appellee, defendant below, and against Appellant, plaintiff below, dismissing Appellant's Complaint on Motion to Dismiss made by Appellee. Appellant appealed from said judgment by duly filing her Notice of Appeal [Tr. pp. 13-15].

The action was brought under and by virtue of the provisions of the Tucker Act, 28 U.S.C.A. §1346, upon which jurisdiction in the District Court was founded. Jurisdiction of this Honorable Court is founded upon the provisions of 28 U.S.C.A. §§1291, 1292, and Federal Rules of Civil Procedure, Rule 73(b).

STATEMENT OF THE CASE

Appellant at all times material to this action and for many years prior to the institution of the action owned and operated Ranch Oro Verde in Kern County, California, consisting of a guest ranch, hotel, restaurant, bar, dance hall, rodeo grounds, swimming pool, race track, hog, cattle, horse and airport business [Tr. pp. 4-5]. Appellant brought the action in the case at bar under the provisions of the Tucker Act [28 U.S.C.A. §1346] to recover damages sustained by her by reason of repeated and continuous trespasses made by the Appellee upon her property and to recover damages sustained by reason of a partial taking or inverse condemnation of the same property by reason of the acts of the Appellee [Tr. pp. 4-5].

Appellant filed her initial Complaint in this action on December 3, 1952 [Tr. p. 14]; her First Amended Complaint, the judgment dismissing which is the subject of this appeal, was filed February 28, 1955 [Tr. p. 5].

On February 27, 1953, the Appellee filed a condemnation action and a Declaration of Taking, relat-

ing to the entire fee simple title of the above-mentioned property of the Appellant. The condemnation suit is pending. The suit is entirely separate and distinct from the action in the case at bar [Tr. p. 14].

The Complaint does not spell out the nature of the activities of the Government of which she complains, but it does indicate that the Government closed and kept closed her airport beginning in 1941 until 1945, and that during an unspecified period of time the Government used the airport; the Appellant complained that the Appellee committed a "continuous tort . . . against the plaintiff resulting in a partial taking or inverse condemnation of plaintiff's property and damage to her business" [Tr. p. 4]. The activities of the Government of which complaint was made continued until the time of filing of the initial complaint [Tr. pp. 37, 38, 39]; at the time the initial complaint was filed Appellant was in possession of and had title to the property [Tr. p. 32].

Appellee moved to dismiss the Amended Complaint on the grounds that the Court was without jurisdiction over the person of the Appellee and without jurisdiction over the causes of action alleged in the Complaint, and on the further ground that the Complaint failed to state a claim against the Appellee upon which relief could be granted [Tr. p. 6]. The trial court granted the Motion on the grounds, as stated by the Court:

"The motion to dismiss will be granted, on the ground it doesn't state a claim against the United States, and assuming it states a claim for some

kind of trespass, the acquisition of the property through condemnation by the government put an end to the action, and therefore what followed subsequently was done under the power of condemnation and cannot be cumulative so as to make it a continuous tort.” [Tr. p. 39]

Appellant also filed an Affidavit of Bias and Prejudice Disqualifying Judge Yankwich in support of her oral motion for disqualification; the Court denied Appellant’s motion [Tr. pp. 9-12].

SPECIFICATIONS OF ERROR

Appellant respectfully submits that the District Court erred in the following particulars:

1. In granting the Government’s Motion to Dismiss on the ground that no claim for relief could be stated by Appellant against the Government;
2. In dismissing the action on the ground that any claim for damages for trespass was terminated by the filing of the Government’s condemnation action;
3. In refusing to disqualify himself under the circumstances of this case.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION TO DISMISS ON THE GROUND THAT NO CLAIM FOR RELIEF COULD BE STATED BY APPELLANT AGAINST THE GOVERNMENT.**A. The Court Erred in Granting the Motion to Dismiss.**

It is well established that a Motion to Dismiss should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. The principle is well stated in *John Walker & Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952), wherein at p. 73, the court said:

" . . . It is also elementary that a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. Even then, a court ordinarily should not dismiss the complaint except after affording every opportunity to plaintiff to state a claim upon which relief might be granted."

In the event the motion is sustained, opportunity to amend should be granted unless the complaint is incurably and hopelessly defective.

Ware v. Travelers Ins. Co., 150 F. 2d 463 (9th Cir. 1945) ;

Kingwood Oil Co. v. Bell, 204 F. 2d 8 (7th Cir. 1953).

A complaint should not be dismissed on motion if it states some sort of claim, inartistically as it may be drawn. This is particularly true where the plaintiff is not represented by counsel.

Brooks v. Pennsylvania R. R., 91 F. Supp. 101 (D.C. S.D. N.Y. 1950) ;

See, also, 5 *Cyc. Fed. Proc.* (2d ed) §§ 15.203, 15.204, 15.206, 15.166; 1 Barron & Holtzoff, *Fed. Proc. & Prac.* (1950), §356.

The Court did not grant Appellant leave to amend [Tr. pp. 39-40]; the original complaint was detailed, but the Appellant amended it, apparently voluntarily, after the Appellee objected to its narrative form [Tr. p. 35].

The Amended Complaint is indefinite in that it fails specifically to state the nature of the activities of the Government of which complaint is made and to state the period of time during which said activities took place. There is no indication that a Motion for a More Definite Statement would not have cured both of these defects. Under such circumstances, a Motion to Dismiss should not be granted.

1 Barron & Holtzoff, *Fed. Proc. & Prac.* (1950) §356, p. 647.

There is some indication that the Government's Motion was, in part, predicated upon its theory of the applicable Statute of Limitations [Tr. p. 31]. Since the Complaint does not specifically state the pertinent dates, however, the matter of limitations does not appear affirmatively from the face of the pleading and

the defense should be raised by way of Answer; or the pertinent information could have been obtained by a Motion for a More Definite Statement.

5 *Cyc. Fed. Proc.* §75.534, p. 545; §15.294;

See *Childers v. Eagle Picher Lead Co.*, 35 F. Supp. 702 (D.C. W.D. Mo. 1940).

B. The Amended Complaint Contained Allegations which Could Entitle Appellant to Relief Against Appellee.

The Appellant brought her action under the Tucker Act, which provides, in pertinent part, as follows:

“(a) The district court shall have original jurisdiction . . . of . . .

“(2) Any other civil action or claim against the United States, not exceeding Ten Thousand Dollars in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” [28 U.S.C.A. §1346; formerly, 28 U.S.C.A. §41(20).]

(b) [T]he district courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death, caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if

a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” [28 U.S.C.A. §1346]

Had Appellant been afforded the opportunity, she may well have been able to state a claim for relief on any one or all of several theories: (1) a claim for relief predicated upon a theory of implied contract with the Government for the temporary use by the Government of her airport; (2) a claim of relief predicated upon a theory of a partial taking of her property, prior to its condemnation, by reason of the Government’s unauthorized use of and activities upon portions of her property other than the airport; or (3) a claim for relief on the theory that the activities of the Government constituted continuous and repeated trespasses (not amounting to a “taking” in the constitutional sense) compensable under the Federal Tort Claims Act [28 U.S.C.A. §1346(b)].

It is well recognized that there may be a “taking” in a constitutional sense, giving rise to an implied contract, by activities of the Government in interfering with the use and enjoyment of the property by the plaintiff or in using the property by the Government, without formal condemnation proceedings.

E.g. *United States v. Dickinson*, 331 U.S. 745 (1947);

United States v. Causby, 328 U.S. 256 (1946).

Furthermore if a landowner suffers special damages from the Government’s use of adjoining property, the landowner is entitled to recover damages for

the diminution in value of his property therefor. Thus, in *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1913) plaintiff owned land near a railroad tunnel, which had been constructed under an Act of Congress. As trains ran through the tunnel, fans blew the smoke and fumes over and upon the plaintiff's property. The Government did not appropriate any of plaintiff's land and did not "take" the property in a physical sense. The plaintiff, however, who had suffered special damages not suffered by the public generally, was entitled to damages; the Court at 557 said:

" . . . Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation . . . and pending its acquisition defendant is responsible. If the damage is readily preventible [sic], the statute furnishes no excuse, and defendant's responsibility follows on general principles."

On the other hand, the acts of the Government upon the Appellant's property may not have constituted a "taking" or partial taking prior to the institution of the formal condemnation action, but such acts may constitute repeated and continuous trespasses.

The United States Supreme Court in *Dalehite v. United States*, 346 U.S. 15, 45 (1953) has construed the term "wrongful act", as used in the Federal Tort & Claims Act to mean trespass:

"Petitioners rely on the word 'wrongful' as showing that something in addition to negligence is covered. . . [T]he legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of absolute liability. . . rather, Committee discussion indicates that it had a much narrower inspiration: 'trespasses' which might not be considered strictly negligent . . ."

The District Court in *Lemaire v. United States*, 76 F. Supp. 498 (D. Mass. 1948) held that a continuing trespass by the Government was cognizable under the Federal Tort Claims Act.

The Federal Tort Claims Act refers the question of liability to decisions of the state courts in the state in which the act or omission occurred [28 U.S.C.A. §§1346, 2674]; in the case at bar the acts complained of took place in the State of California [Tr. p. 3].

The California cases distinctly recognize and grant relief for continuous trespasses.

Carbine v. Meyer, 126 Cal. App. 2d 386, 390, 272 P. 2d 849 (1945);

Cf. *Phillips v. City of Pasadena*, 27 Cal. 2d 104, 162 P. 2d 625 (1945).

II.

THE DISTRICT COURT ERRED IN DISMISSING
THE ACTION ON THE GROUND THAT ANY
CLAIM FOR DAMAGES FOR TRESPASS WAS
TERMINATED BY THE FILING OF THE GOV-
ERNMENT'S FORMAL CONDEMNATION AC-
TION.

The District Court stated as its ground for granting the Motion to Dismiss that the filing of the Government's condemnation action ended any cause of action the Appellant may have had for damages for trespass.

No authority has been found which would support the District Court's theory.

A contrary principle is stated in 1 Am. Jur. "Abatement and Revival" §45, p. 49:

"The common-law rule that the transfer by the plaintiff of his interest in the subject-matter of a pending action may be pleaded in abatement thereof does not cause the abatement of the action when the *plaintiff transfers the property out of which the cause of action arose*. Thus, consequential damages for injury to real estate accrue to the person owning the land at the time of the injury; and if, after commencing an action for such injury, he sells and conveys the land, this will not affect his right to recover." (Emphasis added.)

Although the point has not been raised squarely in any California case found, *dicta* state the same principles enunciated in the quotation above.

See, *Stufflebeem v. Adelsbach*, 135 Cal. 221, 223-24, 67 Pac. 140 (1901);

Cheatham v. Municipal Court, 112 Cal. App. 114, 116, 296 Pac. 305 (1931).

There is no indication in the Federal Tort Claims Act that any action created thereby shall be terminated by Government acquisition of the property out of which the cause of action arose.

III.

THE DISTRICT COURT ERRED IN REFUSING TO DISQUALIFY HIMSELF UNDER THE CIRCUMSTANCES OF THIS CASE.

Appellant filed an Affidavit of Bias and Prejudice to disqualify Judge Leon R. Yankwich from hearing the Motion to Dismiss. In the affidavit Appellant recited the history of her engagements with Judge Yankwich [Tr. pp. 9-10] which indicated that that Judge entertained personal bias against her.

The attitude which the Honorable Judge Yankwich bore towards appellant is further illustrated by the colloquy occurring in respect of her Affidavit of Bias and Prejudice set forth in the margin.*

For the foregoing reasons, the Appellant contends that she did not obtain a fair opportunity to present her case and by reasons of the errors of law hereinabove mentioned, she respectfully urges that this

* "Miss Barnes: [referring to a conversation which Mr. Deutz had with Judge Yankwich while Miss Barnes was in Mr. Deutz' office] 'Here let me talk to his Honor.' And Mr. Deutz said: 'Well, just a minute, she would like to speak to you' . . . and I heard you over the phone saying, 'Well, I won't talk to her; I won't talk to her.'"

"The Court: 'This is correct. I do not talk to litigants, and you are a litigant. The only truthful thing in your affidavit is that I refused to see you, because you have sought, every time you filed a paper, an opportunity to present it to me in person, and the word you received was those were to be filed with the clerk, because it is not the custom to talk to litigants, and while you appear in pro per that doesn't make you a lawyer, and we do not talk to litigants.'"

"Miss Barnes: 'I disagree with you, your Honor. It doesn't make me a lawyer, except according to myself, but I certainly should receive the same consideration as a lawyer.'"

"The Court: 'We do not talk to litigants. We talk to lawyers because lawyers know the ethics of the profession, and litigants do not.'"

Honorable Court reverse the Judgment and Order of the District Court dismissing her Amended Complaint.

Respectfully submitted,

PANCHO BARNES,

Appellant, In Propria Persona